Filed 11/19/15 Delgado v. Bank of America CA4/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

DAVID G. DELGADO et al.,	
Plaintiffs and Appellants,	E061033
v.	(Super.Ct.No. CIVRS1303256)
BANK OF AMERICA, N.A.,	OPINION
Defendant and Respondent.	

APPEAL from the Superior Court of San Bernardino County. Joseph R. Brisco, Judge. Affirmed.

David G. Delgado and Viola K. Delgado, in pro. per., for Plaintiffs and Appellants.

Reed Smith, Michael E. Gerst and Myles A. Lanzone for Defendant and Respondent.

Plaintiffs and appellants David and Viola Delgado sued defendant and respondent Bank of America, N.A. after they defaulted on their mortgage loan. Plaintiffs allege that defendant fraudulently induced them to obtain a loan they could not afford and that defendant did not have the authority to initiate nonjudicial foreclosure proceedings against their property. On appeal, plaintiffs challenge the trial court's order sustaining defendant's demurrer without leave to amend.[1] We affirm.

I

FACTUAL AND PROCEDURAL HISTORY

We take the following facts from the allegations in plaintiffs' complaint and the real property records that the trial court properly judicially noticed. (*Etheridge v. Reins Internat. California, Inc.* (2009) 172 Cal.App.4th 908, 914 [courts may consider matters which may be judicially noticed when reviewing a ruling on a demurrer].)[2]

Plaintiffs allege that defendant is the assignee of a fixed-rate mortgage loan for $273,000 that they obtained in January 2007. The loan was secured by a deed of trust on plaintiffs' property in Rancho Cucamonga. The deed of trust identified Countrywide

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[1] Plaintiffs were represented by counsel during the trial court proceedings; on appeal, they represent themselves in propria persona.

[2] "[A] court may take judicial notice of the fact of a document's recordation, the date the document was recorded and executed, the parties to the transaction reflected in a recorded document, and the document's legally operative language, assuming there is no genuine dispute regarding the document's authenticity. From this, the court may deduce and rely upon the legal effect of the recorded document, when that effect is clear from its face." (*Fontenot v. Wells Fargo Bank, N.A.* (2011) 198 Cal.App.4th 256, 265.) On appeal, plaintiffs do not argue that the court erred in taking judicial notice.

Home Loans, Inc. (Countrywide) as the lender and Mortgage Electronic Registration Systems, Inc. (MERS) as the beneficiary "acting solely as a nominee" for Countrywide and Countrywide's "successors and assigns."[3] At some point, plaintiffs' loan was pooled with other loans in a securitized investment trust.

In May 2011, plaintiffs stopped making payments on the loan as a result of "financial hardship" and a "lesser income." In October 2011, defendant recorded a notice of default, informing plaintiffs that their property could be sold if they did not bring their mortgage account into good standing. In January 2012, defendant recorded a notice of trustee's sale. However, according to plaintiffs' complaint and the briefing submitted in this appeal, no trustee's sale has yet taken place.

On May 10, 2013, plaintiffs sued defendant, alleging, among other things, that defendant had fraudulently induced them to obtain a loan they could not afford and had wrongfully foreclosed on their property. They sought a judicial declaration vacating the deed of trust and quieting title in their favor. They also sought over $1 million in damages.

Plaintiffs filed the operative second amended complaint (the complaint) on September 26, 2013. The complaint purported to allege causes of action for: (1) fraud; (2) wrongful foreclosure; (3) breach of implied covenant of good faith and fair dealing;

[3] Defendant is the assignee of Countrywide.

(4) violation of California's unfair competition law (UCL) (Bus. & Prof. Code, § 17200); (5) quiet title; (6) declaratory relief; and (7) fraudulent inducement.

Defendant demurred to each cause of action, and the court sustained the entire demurrer without leave to amend. Specifically, the court ruled that the fraud, fraudulent inducement, breach of implied covenant of good faith and fair dealing, and UCL claims were time-barred. The court sustained the demurrer to the wrongful foreclosure claim on the grounds that: (1) plaintiffs lacked standing to challenge defendant's authority to initiate foreclosure proceedings and (2) plaintiffs failed to allege tender. The court's ruling that plaintiffs had failed to allege tender was also the basis for the court's dismissal of the quiet title claim. Lastly, it ruled that a declaratory relief claim is inappropriate in a foreclosure action.

On February 6, 2014, the court entered judgment in favor of defendant. On February 13, 2014, plaintiffs moved for a new trial, arguing that the court erred in dismissing their claims. The court denied plaintiffs' motion as untimely and lacking the required supporting affidavits. (Code Civ. Proc., §§ 658, 659a.)

Plaintiffs timely filed a notice of appeal of the trial court's denial of their motion for new trial.

II

ANALYSIS

A. *Appealability and Waiver of the Appeal of Plaintiffs' New Trial Motion*

As an initial matter, we address defendant's request that we dismiss plaintiffs' appeal. Defendant points out that plaintiffs' opening brief only discusses the court's decision to sustain the demurrer, whereas the notice of appeal states that plaintiffs are challenging the court's denial of their motion for new trial.[4] Defendant argues that because plaintiffs "never filed an amended notice of appeal, explained their actions in the opening brief, or asked the Court for permission to raise new issues on appeal," we should dismiss the appeal.

Defendant's argument is well taken in light of the fundamental rule that the notice of appeal must specify each particular order being appealed. (Cal. Rules of Court, rule 8.100(a)(2).) This rule is jurisdictional: the Court of Appeal does not have power to hear an appeal of an order not specified in the notice. (See, e.g., *Sole Energy Co. v. Petrominerals Corp.* (2005) 128 Cal.App.4th 212, 240.) Nevertheless, we decide to reach the merits of plaintiffs' appeal. We generally construe notices liberally in order to implement the "strong public policy in favor of hearing appeals on the merits." (*Department of Industrial Relations v. Nielsen Construction Co.* (1996) 51 Cal.App.4th 1016, 1023-1024.) This is especially so where, as here, the notice causes no prejudice or

[4] The notice also indicates plaintiffs intend to appeal a "default judgment," which appears to be a mistake as no default judgment was entered in this case.

confusion concerning the scope of the appeal. (*In re Marriage of Macfarlane & Lang* (1992) 8 Cal.App.4th 247, 253.) Defendant could not have been confused by the disparity between the notice and plaintiffs' opening brief because the sole basis of plaintiffs' motion for new trial was the trial court's order sustaining the demurrer. Additionally, defendant was not prejudiced by the notice because it fully briefed the validity of the court's ruling on the demurrer.

Plaintiffs have, however, waived any challenge to the court's ruling denying their motion for new trial by failing to address that ruling in their opening brief. "An appellant's failure to raise an argument in its opening brief waives the issue on appeal." (*Dieckmeyer v. Redevelopment Agency of Huntington Beach* (2005) 127 Cal.App.4th 248, 260 (*Dieckmeyer*).) In their reply brief, plaintiffs assert that the court erred in denying their motion for new trial because their motion was timely. However, an appellant cannot salvage an abandoned argument with a "conclusory statement." (*Paulus v. Bob Lynch Ford, Inc.* (2006) 139 Cal.App.4th 659, 685.) Moreover, even assuming plaintiffs had not abandoned their challenge, it is clear from the record that their motion for new trial was untimely. The Code of Civil Procedure provides that any brief in support of a motion for new trial must be filed within 10 days of the notice of intent to move for new trial. (Code Civ. Proc., § 659a.) Plaintiffs filed their notice of intent on February 13, 2014 and their supporting brief on February 26, which is three days past the deadline.

B. *The Demurrer*

1. *Standard of review*

A demurrer should be sustained when "[t]he pleading does not state facts sufficient to constitute a cause of action." (Code Civ. Proc., § 430.10, subd. (e).) "We independently review the superior court's ruling on a demurrer and determine de novo whether the complaint alleges facts sufficient to state a cause of action or discloses a complete defense. [Citations.] We assume the truth of the properly pleaded factual allegations, facts that reasonably can be inferred from those expressly pleaded and matters of which judicial notice has been taken. [Citations.] We liberally construe the pleading with a view to substantial justice between the parties. [Citations.]" (*Regents of University of California v. Superior Court* (2013) 220 Cal.App.4th 549, 558.)

" 'We affirm if any ground offered in support of the demurrer was well taken but find error if the plaintiff has stated a cause of action under any possible legal theory. [Citations.] We are not bound by the trial court's stated reasons, if any, supporting its ruling; we review the ruling, not its rationale. [Citation.]' " (*Walgreen Co. v. City and County of San Francisco* (2010) 185 Cal.App.4th 424, 433.)

"If we determine the facts as pleaded do not state a cause of action, we then consider whether the court abused its discretion in denying leave to amend the complaint. [Citation.] It is an abuse of discretion for the trial court to sustain a demurrer without leave to amend if the plaintiff demonstrates a reasonable possibility that the defect can be cured by amendment." (*Bank of America, N.A. v. Mitchell* (2012) 204 Cal.App.4th 1199,

1204.) However, " '[s]uch a showing can be made for the first time to the reviewing court [citation] . . . .' [Citation.]" (*San Diego City Firefighters, Local 145 v. Board of Administration etc.* (2012) 206 Cal.App.4th 594, 606.)

2. *Wrongful foreclosure*

The elements of a wrongful foreclosure claim are: "(1) the trustee or mortgagee caused an illegal, fraudulent, or willfully oppressive sale of real property pursuant to a power of sale in a mortgage or deed of trust; (2) the party attacking the sale (usually but not always the trustor or mortgagor) was *prejudiced* or harmed; and (3) in cases where the trustor or mortgagor challenges the sale, the trustor or mortgagor *tendered* the amount of the secured indebtedness or was excused from tendering." (*Miles v. Deutsche Bank National Trust Co.* (2015) 236 Cal.App.4th 394, 408, italics added.) The allegations in plaintiffs' complaint do not satisfy any of these elements.

The first element requires that a foreclosure sale has actually taken place. Here, there has been no sale. Plaintiffs allege that they "*will* incur the loss of their personal residence if a non-judicial foreclosure [sale] is *allowed to proceed*." (Italics added.)

Plaintiffs' argument on appeal seems to be that they are authorized to challenge defendant's authority to *initiate* foreclosure proceedings regardless of whether a sale has taken place. They assert that, based on purported flaws in the chain of title to the note and the deed of trust, defendant was not authorized to initiate foreclosure. Plaintiffs do not have standing to make this argument.

A borrower in default on a loan does not have standing to attack a purportedly void assignment of a note or deed of trust to which it is not a party as a means of forestalling the foreclosure process. In *Jenkins v. JPMorgan Chase Bank, N.A.* (2013) 216 Cal.App.4th 497 (*Jenkins*), the court held that California's comprehensive nonjudicial foreclosure scheme does not provide for a preemptive action to challenge the authority of the party initiating foreclosure, absent unusual circumstances not present here. (*Id.* at pp. 512-513.) We agree that allowing such a cause of action would "fundamentally undermine the nonjudicial nature of the process and introduce the possibility of lawsuits filed solely for the purpose of delaying valid foreclosures." (*Gomes v. Countrywide Home Loans, Inc.* (2011) 192 Cal.App.4th 1149, 1155 (*Gomes*).)

Plaintiffs argue that *Glaski v. Bank of America* (2013) 218 Cal.App.4th 1079 (*Glaski*) allows them to challenge defendant's authority to initiate foreclosure proceedings. In *Glaski*, the court determined that the borrower had standing to attack a void assignment to which it was not a party. (*Id.* at p. 1095.) However, unlike the present case, *Glaski* involved a post-foreclosure action for damages, not an action to prevent foreclosure. (*Id.* at p. 1086.)

With the exception of *Glaski*, California cases hold that, even in post-foreclosure actions, a borrower lacks standing to challenge an assignment absent a showing of prejudice. (E.g., *Siliga v. Mortgage Electronic Registration Systems, Inc.* (2013) 219 Cal.App.4th 75, 85-86.) In reaching the opposite conclusion, *Glaski* relied on federal case law interpreting the law of other jurisdictions. (*Glaski, supra*, 218 Cal.App.4th at

pp. 1094-1095.) We are not aware of any California case that has followed *Glaski* on the issue of a borrower's right to challenge a foreclosure based on an allegedly improper assignment. (See *People v. Gipson* (2013) 213 Cal.App.4th 1523, 1529 ["It is true that we typically follow the decisions of other appellate districts or divisions, but only if we lack good reason to disagree"].)

In any event, even if plaintiffs could challenge the assignment, they would not be able to allege harm or prejudice, the second element of wrongful foreclosure. A transaction that "merely substitute[s] one creditor for another, without changing [a plaintiff's] obligations under the note," does not cause the plaintiff prejudice if she "effectively concedes she was in default" and "does not allege that the transfer . . . interfered in any manner with her payment of the note." (*Fontenot v. Wells Fargo Bank, N.A.*, *supra*, 198 Cal.App.4th at p. 272.) "Because a promissory note is a negotiable instrument, a borrower must anticipate it can and might be transferred to another creditor." (*Ibid.*)

Here, plaintiffs were in default, and they do not allege that the assignment or securitization of their loan changed their payment obligations in any way. They also do not allege the kind of harm that an assignment could conceivably cause, such as lost payments, miscalculation of debt, or default issued in error. "Absent any prejudice, [the plaintiffs] have no standing to complain about any alleged lack of authority [to initiate foreclosure proceedings]." (*Siliga v. Mortgage Electronic Registration Systems, Inc.*, *supra*, 219 Cal.App.4th at p. 85.)

We also reject plaintiffs' contention that the notice of default and notice of trustee's sale were void *ab initio* because they were robo-signed. The complaint alleges that the notice of default "contains a robo[-]signature of one 'Araya Dhanasopon, Assistant Vice President' " and the notice of trustee's sale "contains a robo[-]signature of a 'Rosselin Rincon, Asst Vice President.' " Assuming the signatures were robo-signed, as plaintiffs allege, "[p]rejudice is not presumed from 'mere irregularities' in the [foreclosure] process." (*Fontenot v. Wells Fargo Bank, N.A., supra*, 198 Cal.App.4th at p. 272.) Plaintiffs do not allege that the signatures changed their obligations under the note.

Finally, plaintiffs have not alleged the third element of wrongful foreclosure: tender. Specifically, they do not allege that they attempted to pay their outstanding debt or that they were excused from tendering. Relying on *Hauger v. Gates* (1954) 42 Cal.2d 752, plaintiffs contend that they are excused from tendering because they have alleged damages of "over $1 million," which damages constitute a "counter-claim" against defendant that "more than offset[s] the $275,000 balance of his loan." To the contrary, plaintiffs have not filed a counter-claim that would demonstrate that "there was not in fact any indebtedness . . . under the note secured by the deed of trust." (*Id.* at p. 754.) Their prayer for $1 million in punitive damages is not a counter-claim or offset and does not excuse them from the requirement of tender.

Based on the lack of allegations to support the elements of a wrongful foreclosure claim, we affirm the trial court's ruling on demurrer and its dismissal of that claim.

3. *Fraud and UCL*

Plaintiffs asserted a claim for fraud and a claim for fraudulent concealment. Both claims are based on an alleged violation of Civil Code section 1572 and are based on the same factual allegations regarding defendant's conduct leading up to finalization of the loan. Plaintiffs allege that defendant engaged in fraudulent conduct to induce them to enter into a mortgage loan that they could not afford, and that they obtained the loan on January 24, 2007. This alleged fraudulent conduct is also the basis for plaintiffs' UCL claim. Specifically, plaintiffs allege that defendant violated the UCL by marketing the loan to them "on the basis of exaggeration, misrepresentation, and/or the concealment of material facts," and by "aggressively" selling the loan "as a fixed low interest home loan," which it "knew . . . would be unaffordable."

The statute of limitations for a claim of fraud is three years. (Code Civ. Proc., § 338, subd. (d).) The statute of limitations for a UCL claim is four years. (Bus. & Prof. Code, § 17208.) Because defendant's allegedly unlawful conduct occurred during the time leading up to the signing of the loan in January 2007, the limitations period on plaintiffs' fraud and UCL claims expired, at the latest, in January 2010 and 2011, respectively. Because plaintiffs filed suit in May 2013, it is clear from the face of the complaint that their fraud and UCL claims are time-barred. (*Committee For Green Foothills v. Santa Clara County Bd. of Supervisors* (2010) 48 Cal.4th 32, 42 [it is proper to sustain a demurrer to a claim that is "clearly and affirmatively" time-barred "on the face of the complaint"].)

In opposing the demurrer, plaintiffs argued that their claims were timely under the "delayed discovery rule." Despite the trial court's ruling that plaintiffs failed to allege facts to support application of the "delayed discovery rule," plaintiffs do not address the statute of limitations or delayed discovery issue in their opening brief. Thus, they have waived any challenge to whether these claims are time-barred. (*Dieckmeyer*, *supra*, 127 Cal.App.4th at p. 260.)

In an attempt to evade the problem of an expired limitations period, plaintiffs change course on appeal and argue that their fraud claims are based on defendant's actions *during the foreclosure proceedings*. Instead of addressing the statute of limitations and the discovery rule, plaintiffs argue in their opening brief that their actual fraud claim is based on the allegation that defendant forged the signatures on the notice of default and notice of trustee's sale. They argue that their fraudulent concealment claim is based on the allegation that defendant concealed the fact that it did not have the legal authority to initiate foreclosure proceedings. These arguments are not reflected in the complaint. All of plaintiffs' allegations of fraud and fraudulent concealment relate to defendant concealing the terms of the loan and inducing plaintiffs to obtain a loan they could not afford.

Moreover, even assuming that plaintiffs based their fraud claims on post-loan allegations of robo-signing and concealment of a lack of authority to initiate foreclosure proceedings, those allegations would not meet the heightened pleading requirements for fraud claims against corporate defendants. "Every element of the cause of action for

fraud must be alleged in the proper manner and the facts constituting the fraud must be alleged with sufficient specificity to allow defendant to understand fully the nature of the charge made." (*Tarmann v. State Farm Mut. Auto. Ins. Co.* (1991) 2 Cal.App.4th 153, 157.) To plead fraud against a corporation, a plaintiff must "allege the names of the persons who made the allegedly fraudulent representations, their authority to speak, to whom they spoke, what they said or wrote, and when it was said or written." (*Ibid.*) Plaintiffs have not done so.

We therefore affirm the trial court's ruling on demurrer and its dismissal of the fraud and UCL claims.

4. *Quiet title and declaratory relief*

Plaintiffs' sole argument as to why the court erred in sustaining the demurrer and dismissing their quiet title and declaratory relief claims is that the claims should be reinstated because they are "based on" the fraud and wrongful foreclosure claims. Plaintiffs provide no explanation, legal or logical, for why this would be so. (See *Paulus v. Bob Lynch Ford, Inc.*, *supra*, 139 Cal.App.4th at p. 685 [issues must be supported by argument or citation to authority].) The elements for fraud, wrongful foreclosure, quiet title and declaratory relief are different. Thus, even if we *had* concluded that plaintiffs sufficiently plead their fraud and wrongful foreclosure claims, that conclusion would have no effect on the sufficiency of their quiet title and declaratory relief claims.

In any event, there are significant insufficiencies with plaintiffs' quiet title and declaratory relief claims. As with wrongful foreclosure, an element of quiet title is that the plaintiff has tendered the outstanding debt. (*Aguilar v. Bocci* (1974) 39 Cal.App.3d 475, 477-478 ["mortgagor cannot quiet title without discharging his debt"].) As explained *ante*, plaintiffs did not allege tender nor facts that would excuse them from tender.

As to declaratory relief, plaintiffs allege a present controversy exists over whether defendant had the authority to initiate nonjudicial foreclosure proceedings based on an alleged transfer of the underlying debt. As a general matter, a plaintiff may not bring a declaratory relief action to determine whether a party has authority to initiate a nonjudicial foreclosure. (*Gomes*, *supra*, 192 Cal.App.4th at pp. 1156-1157.) Moreover, as *Jenkins* holds, a borrower cannot "construct a dispute" regarding the validity of the assignment of a note or deed of trust to which it is not a party as a way to challenge the foreclosure process. (*Jenkins*, *supra*, 216 Cal.App.4th at pp. 512-513, 515.)

We affirm the trial court's dismissal of the quiet title and declaratory relief claims.

5. *Implied covenant of good faith and fair dealing*

Plaintiffs did not address their implied covenant of good faith and fair dealing claim in their opening brief and therefore they have waived any argument regarding its sufficiency. (*Dieckmeyer*, *supra*, 127 Cal.App.4th at p. 260.)

6. *Leave to Amend*

When a court sustains a demurrer without leave to amend, the plaintiff has the burden of proving how an amendment would cure the defect. (*Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081, quoting *Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) If the plaintiff does not demonstrate on appeal "how he can amend his complaint, and how that amendment will change the legal effect of his pleading," we must presume plaintiff has stated his allegations "as strongly and as favorably as all the facts known to him would permit." (*Community Cause v. Boatwright* (1981) 124 Cal.App.3d 888, 902.)

Here, plaintiffs have not met their burden of showing how they would amend their complaint in order to state their claims sufficiently. Plaintiffs refer to amendment just once in their briefs. They state that they can cure any defect in failing to allege the prejudice element of wrongful foreclosure because they "can amend [their complaint] to claim damages for emotional distress." Plaintiffs' complaint *already* alleges that they have suffered emotional distress as a result of the foreclosure process, and prejudice was not the only element of wrongful foreclosure plaintiffs failed to plead. Because they have made no other representation as to what they would allege in an amended complaint, let alone what effect those allegations would have on the sufficiency of their claims, we conclude that the court did not err when it sustained the demurrer without leave to amend.

III

DISPOSITION

The judgment dismissing plaintiffs' claims is affirmed. Defendant shall recover its costs on appeal.

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CODRINGTON
J.

We concur:

McKINSTER
Acting P. J.

MILLER
J.